

Volume 11

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

IN RE PACIFIC FERTILITY CENTER) **No. 18-1586 JSC**
LITIGATION)
_____)

San Francisco, California
Tuesday, June 8, 2021

TRANSCRIPT OF PROCEEDINGS

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Official Reporter - U.S. District Court

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Tuesday - June 8, 2021

8:05 a.m.

P R O C E E D I N G S

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(Proceedings held outside the presence of the jury:)

THE COURT: Good morning.

(Counsel greet the Court.)

THE COURT: Okay. So let's first discuss the jury instructions, putting aside punitive damages for the moment.

Are there any comments on the jury instructions? From the plaintiffs?

MS. SHARP: I don't believe so, Your Honor.

THE COURT: All right. And from Chart?

MR. DUFFY: Not from Chart. Just based on our prior objections, I want to state --

THE COURT: Those are preserved for the record.

MR. DUFFY: Thank you.

THE COURT: So with respect to the verdict form, I've been thinking -- and again I was thinking this morning -- I wonder if the jury were to find for Chart on Question Number 2, I think we don't get to the negligent recall because that would be a finding of the sole cause. Not the reasonable forceable because it's different theories as to the use or misuse, but as to causation.

I think that then eliminates -- for them to find sole cause, they'd have to say that Chart's conduct was not even a

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1 substantial factor. That was Mr. Polk's point yesterday, which
2 is correct. So if Chart's conduct was not even a substantial
3 factor, then they can't find for the plaintiff on Number 12.

4 **MR. POLK:** I was just reading from the directions for
5 use. So I did think that the way the Court had it originally,
6 before the edit yesterday, makes more sense.

7 **THE COURT:** So, wait. So I think it would say, "If
8 you answered yes under Number 2, skip questions" -- no. "If
9 you answered yes," then they just sign the verdict form at that
10 point. Okay.

11 **MR. DUFFY:** Yes. That's what I think, Your Honor.

12 **THE COURT:** Yeah. All right. We'll make those
13 changes.

14 And then the other -- the only other thing was in Question
15 1 we'll say -- should I say -- in the jury instruction we
16 define the Product as Tank 4 and the controller. So should I
17 say was the Product misused, so that it follows the jury
18 instruction on misuse or modification? Or should I say was
19 Tank 4 and/or the controller?

20 **MR. DUFFY:** Why don't you say "and the controller";
21 right? Maybe both, because this is fairly specific, and if we
22 take them back -- I would put both in there because, otherwise,
23 they have to go back to get that definition.

24 **THE COURT:** I think if we just say Tank 4, that's
25 different from the definition.

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1 What is plaintiffs' position?

2 MR. POLK: Just give me one second.

3 THE COURT: Sure.

4 MR. POLK: I want to get the jury instruction --
5 Where do we define Tank 4, Your Honor?

6 MR. POLK: -- harmonized here. One moment.

7 THE COURT: It's instruction, I think, number 20 --
8 no, yeah, 21.

9 MR. POLK: They define it as -- it is defined as
10 "cryogenic tank and the TEC 3000 electronic controller," and
11 then together the "Product."

12 THE COURT: The Product. And so should I say "Tank 4
13 and the controller"?

14 MR. POLK: The "Product."

15 THE COURT: Or just say the "Product"? I think I
16 should say "the Product."

17 MR. POLK: That's our preference.

18 THE COURT: Yeah.

19 MR. DUFFY: I think we want to capitalize the
20 definition in 21, Your Honor, because it's lower case P for
21 product.

22 THE COURT: I think that makes sense. "Together the
23 Product," capitalized. And then in Number 1, the "Product"
24 capitalized.

25 MR. DUFFY: That way they can follow it.

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1 **THE COURT:** That they'll know.

2 **MR. DUFFY:** I'll tie it together in my closings so
3 they see it, but I think that would be helpful.

4 **THE COURT:** The Product. Okay.

5 Okay. Anything more on those?

6 **MR. POLK:** Not from the plaintiff.

7 **THE COURT:** Okay. All right. I will file -- it will
8 again say "proposed" because I don't file the verdict form
9 without saying proposed. But if you want to use it in your
10 closing arguments you can just redact the "proposed" on both.

11 Okay. With respect to the punitive damages, the
12 plaintiffs' burden here is clear and convincing, at least what
13 I read before I came on the bench.

14 I don't think it meets that with respect to, for example,
15 it could be -- let's see, what's her name? -- Daphne Thomas.
16 The problem is we don't know what she communicated to whom or
17 if she communicated. We know she had an intent to communicate,
18 but we don't know what she communicated, to whom, how she
19 framed it or anything. So I don't think that email chain gets
20 you there.

21 Mr. Gonzalez might, but what is the definition of a
22 managing agent? You argue he's the supervisor of two other
23 people. True. But -- I don't know.

24 Do you have anything to add other than what's in there?

25 **MR. POLK:** We do, Your Honor. And I do appreciate

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1 your tentative. I think that the cases that we cite,
2 specifically the Judge Koh decision from *Barrous versus British*
3 *Petroleum*, is worth a look here.

4 We do define managing agent in the brief that we filed.
5 It's somebody who has discretion -- I can get the exact
6 language for you here -- to act on behalf of the company.

7 I do want to clarify what the conduct that we are alleging
8 is. The conduct is that Chart knew that there was a problem
9 with the controllers and that the controllers were failing.

10 Chart knew that they had developed --

11 **THE COURT:** Don't say Chart. Tell me which officer or
12 managing agent knew.

13 **MR. POLK:** Sure. Well, and I will -- I think we've
14 given Your Honor evidence in Exhibit 223 that Chart was --
15 sorry, that Buz Bies and Ramon Gonzalez were aware of the
16 repair. And I can show you the exact portion of that exhibit.
17 It's -- and this is from November 7, 2017, the second
18 paragraph. Engineering is --

19 **THE COURT:** Which email? What time?

20 **MR. POLK:** I'm sorry. It's the very top email,
21 1:51:26 p.m. The second paragraph there indicates that:

22 "Engineering is confident that the new MVE TS has much
23 better resilience to electronic interference than the
24 TEC 3000. Maybe you can mention this to Joseph, Ramon,
25 Buzz to push forward" --

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1 **THE COURT:** Was it mentioned to Buzz?

2 **MR. POLK:** Well, Ramon Gonzalez testified that the
3 touchscreen was pushed out in May of 2017.

4 **THE COURT:** What was told to Buzz?

5 **MR. POLK:** Well, Your Honor, we think, based on this
6 email in combination with Mr. Gonzalez's testimony that the
7 touchscreen was pushed out, it would be reasonable to infer
8 that Mr. Bies, who's named in this email along with Chart
9 hierarchy, who's named in Exhibit 284, and upper management,
10 who's named in Exhibit 200, were aware of both the problem and
11 the fix and ratified or approved, which is a route to punitive
12 damages, the decision not to inform their customers, including
13 PFC, that there was a retrofit available.

14 So, yes, you're right, we have a high burden here, higher
15 than a preponderance. But, no, we don't think it's appropriate
16 to take it from the jury at this time.

17 **THE COURT:** Okay. Well, I think that you're right
18 that the fact that there was a retrofit that was offered
19 clearly management would know about that. But what I don't
20 know, what I think the record is devoid of, is exactly what
21 management knew about why the retrofit was needed.

22 **MR. POLK:** Your Honor, I will point you to one more
23 case that we cite. It's the *Pizarro* case. And that case makes
24 it clear that there is no need for a smoking gun memorandum to
25 the CEO or anything like that. And that's a case from this

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1 year.

2 **THE COURT:** No, I completely agree with that. But
3 this isn't -- this is just some testimony. I understand, you
4 know, the way it worked with respect to the depositions and
5 when they came in and what you're going to ask and how it
6 developed, that must be a problem with this case that may not
7 occur with later cases. I don't know if Chart has anything to
8 add.

9 **MR. POLK:** Understood.

10 **MR. DUFFY:** No, Your Honor. I think your comments are
11 correct.

12 **THE COURT:** I'm going to exclude the punitive damages.
13 I'll write something so it will be there. But I think it's
14 just not, especially given the higher standard with respect --
15 I'm only finding with respect to the managing agent/officer
16 element.

17 **MR. POLK:** Understood. Thank you, Your Honor.

18 **THE COURT:** Okay. What does our trial day look like?

19 **MR. LOTHSON:** It's going to be brief, Your Honor. We
20 have a couple depositions to play.

21 **THE COURT:** That's it?

22 **MR. LOTHSON:** Yep.

23 **THE COURT:** All right.

24 **MR. LOTHSON:** About an hour.

25 **THE COURT:** So then let's talk about -- so then what

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1 I'll do is we'll take a break. Or is there any rebuttal?

2 **MS. SHARP:** No, Your Honor.

3 **THE COURT:** No. Okay. We'll take a break, and what
4 I'll tell the jury -- well, you'll rest, and then I'll tell the
5 jury what our -- well, how long are the depositions?

6 **MR. LOTHSON:** One hour.

7 **THE COURT:** Okay, yeah. We'll take -- I'll tell the
8 jury then, at that point, what we're going to do is take a
9 break. We'll come back, I'll read the instructions to them.
10 I'll then suggest that they go back and select their presiding
11 juror and decide their schedule, right, so that we'll close
12 tomorrow.

13 And how long do we need for closings?

14 **MS. SHARP:** Your Honor, you had previously said two
15 hours.

16 **THE COURT:** Yes.

17 **MS. SHARP:** That's what we had been planning for. One
18 question for clarification, while I have the Court's ear. I
19 assume rebuttal for the plaintiffs is agreeable?

20 **THE COURT:** Yes.

21 **MS. SHARP:** Okay. Then two hours total, I think,
22 unless my colleagues kick me. And nobody's kicking me.

23 **THE COURT:** Okay. And about the same for Chart?

24 **MR. DUFFY:** Yeah, that's fine, Your Honor. That's
25 fine.

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1 **THE COURT:** Right. So then we'll probably finish --
2 we'll start at 9:00, so we'll probably finish around 1:30.

3 **MS. SHARP:** Oh.

4 **THE COURT:** So I'll tell the jury that so what I'll
5 then ask them to do, once they select the presiding jury, to
6 figure out what they want to do tomorrow. Do they want to stay
7 and continue to deliberate or stop at 1:30 and come back
8 Thursday.

9 They should also discuss Thursday's schedule, Mr. Toole's
10 child's graduation is 3:00 p.m. So they are able to get,
11 really, a full day in of deliberations, and then if they need
12 Friday as well.

13 **MR. DUFFY:** You know, the other thing is, let's say we
14 don't take the full four hours allotted for closings, just tell
15 them that if that happens they may start a little earlier than
16 that. Just a little wiggle room.

17 **THE COURT:** Yeah. Basically what I'll tell them is
18 they should figure out how long they want to stay on Wednesday.
19 And they should discuss it now so they can plan accordingly.

20 **MR. LOTHSON:** Would they be provided lunch perhaps?

21 **THE COURT:** Yes.

22 **MR. LOTHSON:** Good.

23 **THE COURT:** Good, I'm glad you reminded me. I will
24 tell them that should they tell Ms. Means that they would
25 intend to stay tomorrow, we will provide lunch for them. Okay.

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1 All right. The other thing I would say, the plaintiffs
2 probably know this, but I don't know if Chart, have you been to
3 Arsicault -- I don't know how to pronounce it -- Bakery on --
4 have you guys been there? Yes? You can tell them where it is.

5 They are the best croissant you will ever have in your
6 life. I promise. And so just make sure you go there.

7 **MR. RINGEL:** Could we get a spelling for the record,
8 Your Honor?

9 **THE COURT:** Because I was thinking I was going to go
10 buy some for our jurors because I think none of them are from
11 here, and it would be a shame for them to come to the
12 Tenderloin every day and not enjoy those croissants.

13 **MR. POLK:** Your Honor, there's one issue. There's one
14 exhibit to move into evidence, that I introduced. I don't
15 think there's objection from Chart. It's Trial Exhibit 190.
16 It's the controller manual that I used with Mr. Cauthen, cited
17 in his report.

18 **MR. DUFFY:** No objection, Your Honor.

19 **THE COURT:** 190 admitted. Great. All right. Thank
20 you.

21 (Trial Exhibit 190 received in evidence.)

22 **MR. DUFFY:** Thank you, Your Honor.

23 (Jury enters at 8:18 a.m.)

24 **THE COURT:** Good morning, members of the jury. You
25 may be seated.

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1 Is Chart prepared to call your next witness?

2 **MR. LOTHSON:** Yes, we are, Your Honor. Chart calls
3 William Pickell, from Extron, by video.

4 We have the audio, but I don't know if the video screen is
5 on. They're not on for any of the --

6 **THE COURT:** For me either.

7 (Brief pause.)

8 **THE COURT:** Members of the jury, less you worry, we
9 are finishing the evidence in the case today.

10 **JUROR:** Yea. That's good.

11 **WILLIAM PICKELL, DEFENDANT'S WITNESS, BY VIDEOTAPED TESTIMONY**

12 (Video played; not reported.)

13 **MR. LOTHSON:** That concludes that.

14 **THE COURT:** That concludes that testimony.

15 All right. Is Chart prepared to call your next witness?

16 **MR. RINGEL:** Yes, Your Honor. Chart will call Hana
17 Lamb by video.

18 **HANA ACOSTA, DEFENDANT'S WITNESS, BY VIDEOTAPED TESTIMONY**

19 (Video played; not reported.)

20 **THE COURT:** Does that conclude the testimony?

21 **MR. RINGEL:** Your Honor, that concluded the testimony.
22 I want to list the deposition exhibits that were referenced
23 with the corresponding trial exhibits for the jury.

24 **THE COURT:** All right. So in that testimony you heard
25 exhibit numbers. Those numbers are different for trial

1 exhibits.

2 So you can go ahead.

3 **MR. RINGEL:** Deposition Exhibit 216 is Trial Exhibit
4 423. Deposition Exhibit 217 is Trial Exhibit 422. Deposition
5 Exhibit 211 is Trial Exhibit 415. Deposition Exhibit 372 is
6 Trial Exhibit 144.

7 And, Your Honor, we'd like to move 144 into evidence,
8 which is the only one that's not been previously entered into
9 evidence.

10 **THE COURT:** Any objection? No. Okay. 144 admitted.
11 (Trial Exhibit 144 received in evidence.)

12 **THE COURT:** Do you have another witness?

13 **MR. DUFFY:** No, Your Honor. We believe the jury has
14 heard enough of Chart's defense. The Defense rests.

15 (Defense rests.)

16 **THE COURT:** Thank you.

17 And the plaintiffs do not have any rebuttal.

18 Members of the jury, that concludes the evidence in the
19 case. What we're going to do now is take a 15-minute break.
20 When you return I'm going to read the jury instructions to you,
21 which I'm sorry, are long. But you will get a copy of them.

22 Then what I'm going to do is I'm going to give you some
23 instructions to go back and choose your presiding juror and
24 talk about your schedule.

25 We'll resume tomorrow morning at 9:00 a.m. with closing

JURY INSTRUCTIONS

1 arguments. So you're going to get a surprise break, shortened
2 day today. And then we'll do closing arguments tomorrow, and
3 you can begin your deliberations tomorrow.

4 So we'll take a 15-minute break, and then I'll come back
5 and I'll read the jury instructions to you.

6 We're getting close, but I still need to tell you now to
7 please do not discuss the case yet. We're getting close.
8 Tomorrow you'll be able to do that.

9 Okay. Thank you.

10 (Jury out at 9:30 a.m.)

11 **THE COURT:** All right. Thank you.

12 (Recess taken at 9:31 a.m.)

13 (Proceedings resumed at 9:49 a.m.)

JURY INSTRUCTIONS

14
15 **THE COURT:** So, members of the jury, I'm now going to
16 read you the jury instructions. Some of them you will have
17 heard at the beginning of trial, but we give them to you again
18 because they will guide you during your deliberations.

19 Now that you have heard all of the evidence, it is my duty
20 to instruct you on the law that applies to this case. A copy
21 of these instructions will be available in the jury room, or
22 copies, for you to consult if you find it necessary.

23 It is your duty to find the facts from all the evidence in
24 the case. To those facts you will apply the law as I give it
25 to you. You must follow the law as I give it to you, whether

JURY INSTRUCTIONS

1 you agree with it or not. And you must not be influenced by
2 any personal likes or dislikes, opinions, prejudices, or
3 sympathy. This means you must decide the case solely on the
4 evidence before you. You will recall that you took an oath at
5 the beginning of this case to do so.

6 In following my instructions, you must follow all of them
7 and not single out some and ignore others; they are all equally
8 important. Please do not read into these instructions or
9 anything that I may say or do or have said or done that I have
10 an opinion regarding the evidence or what your verdict should
11 be.

12 We all have feelings, assumptions, perceptions, fears, and
13 stereotypes about others. Some biases we are aware of, and
14 others we might not be fully aware of, which is why they are
15 called implicit or unconscious biases. No matter how unbiased
16 we think we are, our brains are hardwired to make unconscious
17 decisions.

18 We look at others and filter what they say through our own
19 personal experience and background. Because we all do this, we
20 often see life and evaluate evidence in a way that tends to
21 favor people who are like ourselves, or who have had life
22 experiences like our own. We can also have biases about people
23 like ourselves. One common example is the automatic
24 association of male with career and female with family. Bias
25 can affect our thoughts, how we remember what we see and hear,

JURY INSTRUCTIONS

1 whom we believe or disbelieve, and how we make important
2 decisions.

3 As jurors, you are being asked to make an important
4 decision in the case. You must, one, take the time you need to
5 reflect carefully and thoughtfully about the evidence.

6 Two, think about why you are making the decision you are
7 making and examine it for bias. Reconsider your first
8 impressions of the people and the evidence in this case. If
9 the people involved in this case were from different
10 backgrounds, for example, richer or poorer, more or less
11 educated, older or younger, or of a different gender, gender
12 identity, race, religion, or sexual orientation, would you
13 still view them and the evidence the same way?

14 Three, listen to one another. You must carefully evaluate
15 the evidence and resist and help each other resist any urge to
16 reach a verdict influenced by bias for or against any party or
17 witness. Each of you have different backgrounds and will be
18 viewing this case in light of your own insights, assumptions
19 and biases. Listening to different perspectives may help you
20 to better identify the possible effects these hidden biases may
21 have on decision-making.

22 And, four, resist jumping to conclusions based on personal
23 likes or dislikes, generalizations, gut feelings, prejudices,
24 sympathies, stereotypes, or unconscious biases. The law
25 demands that you make a fair decision based solely on the

JURY INSTRUCTIONS

1 evidence, your individual evaluation of that evidence, your
2 reason and common sense, and these instructions.

3 The evidence you are to consider in deciding consists of
4 the sworn testimony of any exhibits, the exhibits that have
5 been admitted into evidence, any facts to which the lawyers
6 have agreed, and any facts that I have instructed you to accept
7 as proved.

8 In reaching your verdict, you may consider only the
9 testimony and exhibits received into evidence. Certain things
10 are not evidence, and you may not consider them in deciding
11 what the facts are. I will list them for you:

12 Arguments and statements by lawyers are not evidence. The
13 lawyers are not witnesses. What they have said in their
14 opening statements, will saying in their closing arguments and
15 at other times is intended to help you interpret the evidence,
16 but it is not evidence. If the facts as you remember them
17 differ from the way the lawyers have stated them, your memory
18 of them controls.

19 Questions and objections by lawyers are not evidence.
20 Attorneys have a duty to their clients to object when they
21 believe a question is improper under the rules of evidence.
22 You should not be influenced by the objection or by the Court's
23 ruling on it.

24 Testimony that was excluded or stricken, or that you have
25 been instructed to disregard, is not evidence and must not be

JURY INSTRUCTIONS

1 considered. In addition, some evidence -- that's fine.

2 Anything you may have seen or heard when the Court was not
3 in session is not evidence. You are to decide the case solely
4 on the evidence received at the trial.

5 Evidence may be direct or circumstantial. Direct evidence
6 is direct proof of a fact, such as testimony by a witness about
7 what that witness personally saw or heard or did.

8 Circumstantial evidence is proof of one or more facts from
9 which you could find another fact. You should consider both
10 kinds of evidence. The law makes no distinction between the
11 weight to be given to either direct or circumstantial evidence.

12 It is for you to decide how much weight to give any
13 evidence. By way of example, if you were to wake up in the
14 morning and see the sidewalk is wet, you may find from that
15 fact that it rained during the night. However, other evidence,
16 such as a turned on garden hose, may provide a different
17 explanation for the presence of water on the sidewalk.

18 Therefore, before you decide that a fact has been proven by
19 circumstantial evidence, you must consider all the evidence in
20 light of reason, experience, and common sense.

21 There are rules of evidence that control what can be
22 received into evidence. When a lawyer asks a question or
23 offers an exhibit into evidence and a lawyer on the other side
24 thinks that it is not permitted by the rules of evidence, that
25 lawyer may have objected. If I overruled the objection, the

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1 question was answered or the exhibit received. If I sustained
2 the objection, the question could not be answered, and the
3 exhibit could not be received. Whenever I sustained an
4 objection to a question, you must ignore the question and must
5 not guess what the answer might have been.

6 The parties have agreed to certain facts which were read
7 to you. You must treat these facts as having been proved.

8 A deposition is the sworn testimony of a witness taken
9 before trial. The witness is placed under oath to tell the
10 truth, and lawyers for each party may ask questions. The
11 questions and answers are recorded. When a person is
12 unavailable to testify at trial, the deposition of that person
13 may be used at the trial.

14 The deposition of the following individuals were used at
15 trial: Seth Adams. Kyle Eubanks. Brendon Wade. Justin
16 Junnier. Jeff Brooks. Ramon Gonzalez. Frank "Buzz" Bies.
17 Gregory Mueller. Hana Lamb. Buster Ingram. And William
18 Pickell.

19 Insofar as possible, you should consider deposition
20 testimony presented to you in court in lieu of live testimony
21 in the same way as if the witness had been present to testify.

22 Evidence was presented to you in the form of answers to
23 one of the parties -- in the form of answers of one of the
24 parties to written interrogatories submitted by the other side.
25 These answers were given in writing and under oath before the

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1 trial in response to questions that were submitted under
2 established court procedures. You should consider the answers,
3 insofar as possible, in the same way as if they were made from
4 the witness stand.

5 Evidence was also presented to you in the form of
6 admissions to the truth of certain facts. These admissions
7 were given in writing before the trial, in response to requests
8 that were submitted under established court procedures. You
9 must treat these facts as having been proved.

10 Certain charts and summaries not admitted into evidence
11 have been shown to you in order to help explain the contents of
12 books, records, documents, or other evidence in the case.

13 Charts and summaries are only as good as the underlying
14 evidence that supports them. You should, therefore, give them
15 only such weight as you think the underlying deserves.

16 Certain charts and summaries have been admitted into
17 evidence to illustrate information brought out in the trial.
18 Again, charts and summaries are only as good as the testimony
19 or other admitted evidence that supports them. You should,
20 therefore, give them only such weight as you think the
21 underlying evidence deserves.

22 In deciding the facts in this case, you may have to decide
23 which testimony to believe and which testimony not to believe.
24 You may believe everything a witness says, or part of it, or
25 none of it.

JURY INSTRUCTIONS

1 In considering the testimony of any witness, you may take
2 into account: The opportunity and ability of the witness to
3 see or hear or know the things testified to; the witness's
4 memory; the witness's manner while testifying; the witness's
5 interest in the outcome of the case, if any; the witness's bias
6 or prejudice, if any; whether other evidence contradicted the
7 witness's testimony; the reasonableness of the witness's
8 testimony in light of all the evidence; and any other factors
9 that bear on believability.

10 Sometimes a witness may say something that is not
11 consistent with something else he or she said. Sometimes
12 different witnesses will give different versions of what
13 happened. People often forget things or make mistakes in what
14 they remember. Also, two people may see the same event but
15 remember it differently. You may consider these differences,
16 but do not decide that testimony is untrue just because it
17 differs from other testimony.

18 However, if you decide that a witness has deliberately
19 testified untruthfully about something important, you may
20 choose not to believe anything that witness said. On the other
21 hand, if you think the witness testified untruthfully about
22 some things but told the truth about others, you may accept the
23 part you think is true and ignore the rest.

24 The weight of the evidence as to a fact does not
25 necessarily depend on the number of witnesses who testify.

JURY INSTRUCTIONS

1 What is important is how believable the witnesses were and how
2 much weight you think their testimony deserves.

3 Experts may give opinions on those subjects in which they
4 have special skills, knowledge, experience, training or
5 education. You should consider each expert opinion in evidence
6 and give it whatever weight it deserves. Remember, you decide
7 all the facts. If, in reaching an opinion, you find that an
8 expert relied on certain facts, and you decide that any of
9 those facts were not true, then you are free to disregard the
10 opinion.

11 The law allows expert witnesses to be asked questions that
12 are based on assumed facts. These are sometimes called
13 "hypothetical questions." In determining the weight to give to
14 the expert's opinion that is based on the assumed facts, you
15 should consider whether the assumed facts are true.

16 Plaintiffs Laura and Kevin Parsell, Chloe Poynton,
17 Rosalynn Enfield, and Adrienne Sletten each engaged with
18 Pacific Fertility Center to provide them with fertility
19 services.

20 Plaintiffs' eggs and embryos were stored in a cryogenic
21 tank, referred to as "Tank 4," which was designed and
22 manufactured by the defendant, Chart Inc. Plaintiffs allege
23 that Tank 4 lost liquid nitrogen during an incident that
24 occurred the weekend of March 4th, 2018, damaging or destroying
25 their eggs and embryos. Plaintiffs assert that the tank

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1 malfunctioned because of a defect in the way it was designed or
2 manufactured by Chart, and that Chart negligently failed to
3 recall the tank's controller.

4 Chart denies plaintiffs' allegations and denies that
5 plaintiffs are entitled to an award of damages. Chart contends
6 that Pacific Fertility Center's misuse of the tank and
7 controller caused the incident and any alleged damage to
8 plaintiffs' frozen eggs and embryos. Plaintiffs claim that
9 they were harmed by a product manufactured by Chart that
10 contained a manufacturing defect or was defectively designed.

11 Claim Number 1: Strict Liability - Manufacturing Defect.

12 Plaintiffs claim that Tank 4, an MVE 808 cryogenic tank,
13 contained a manufacturing defect. To establish this claim,
14 plaintiffs must prove all of the following:

15 First, that Chart manufactured the tank;

16 Second, that the tank contained a manufacturing defect
17 when it left Chart's possession;

18 Third, that plaintiffs were harmed; and

19 Fourth, that the tank's defect was a substantial factor in
20 causing plaintiffs' harm.

21 The parties have stipulated that Chart manufactured the
22 tank, so you must find that the first element of the claim has
23 been proved.

24 A product contains a manufacturing defect if the product
25 differs from the manufacturer's design or specifications or

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1 from other typical units of the same product line.

2 Claim 2: Strict Liability - Design Defect - Consumer
3 Expectations Test.

4 Plaintiffs claim Tank 4's design was defective because the
5 tank did not perform as safely as an ordinary consumer would
6 have expected it to perform. To establish this claim,
7 plaintiffs must prove all of the following:

8 First, that Chart manufactured the tank;

9 Second, that an ordinary consumer of the tank had
10 reasonable minimum safety expectations about the tank;

11 Third, that the tank did not perform as safely as an
12 ordinary user of cryogenic storage tanks would have expected it
13 to perform when used or misused in an intended or reasonable
14 foreseeable way;

15 Fourth, that plaintiffs were harmed;

16 And, fifth, that the tank's failure to perform safely was
17 a substantial factor in causing plaintiffs' harm.

18 An "ordinary consumer" means an ordinary user of the tank.

19 The parties have stipulated that Chart manufactured the
20 tank, so you must find that the first element of the claim has
21 been proved.

22 Claim 3: Strict Liability - Design Defect - Rest-Benefit
23 Test.

24 Plaintiffs also claim that Tank 4's design caused harm to
25 them. To establish this claim, plaintiffs must prove all of

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1 the following:

2 First, that Chart manufactured the tank; second that
3 plaintiffs were harmed; and, third, that the tank's design was
4 a substantial factor in causing harm to plaintiffs.

5 If plaintiffs have proved these three facts, then your
6 decision on this claim must be for plaintiffs unless Chart
7 proves that the benefits of the tank's design outweigh the
8 risks of the design. In deciding whether the benefits outweigh
9 the risks, you should consider the following:

10 The gravity of the potential harm resulting from the use
11 of the tank; the likelihood that this harm would occur; the
12 feasibility of an alternative safer design at the time of
13 manufacture; the cost of an alternative design; and the
14 disadvantages of an alternative design.

15 Again, the parties have stipulated that Chart manufactured
16 the tank, so you must find that the first element of this claim
17 has been proved.

18 Chart's Misuse or Modification Affirmative Defense.

19 Chart claims that it is not responsible for plaintiffs'
20 claimed harm because the MVE 808 cryogenic tank and the
21 TEC 3000 electronic controller, together referred to as the
22 "Product," were misused or modified after it left Chart's
23 possession.

24 To succeed on this affirmative defense, Chart must prove,
25 first, the Product was misused or modified after it left

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1 Chart's possession; and, second, the misuse or modification was
2 so highly extraordinary that it was not reasonably forceable to
3 Chart and, therefore, should be considered as the sole cause of
4 plaintiffs' harm.

5 Plaintiffs' Claim 4: Negligent Failure to Recall.

6 Plaintiffs claim that Chart was negligent because it
7 failed to recall or retrofit the TEC 3000 electronic controller
8 installed on Tank 4. To establish this claim, plaintiffs must
9 prove all of the following:

10 First, that Chart sold the TEC 3000 electronic controller;

11 Second, that Chart knew or reasonably should have known
12 that the controller was dangerous or was likely to be dangerous
13 when used in a reasonably forceable manner;

14 Third, that Chart became aware of this defect after the
15 controller was sold;

16 Fourth, that Chart failed to recall or retrofit the
17 controller;

18 Five, that a reasonable seller under the same or similar
19 circumstances would have recalled or retrofitted the
20 controller;

21 Six, that plaintiffs were harmed; and

22 Seven, that Chart's failure to recall or retrofit the
23 controller was a substantial factor in causing plaintiffs'
24 harm.

25 The parties have stipulated that Chart sold the TEC 3000

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1 electronic controller, so you must find that the first element
2 of the claim has been proved.

3 A substantial factor in causing harm is a factor that a
4 reasonable person would consider to have contributed to the
5 harm. It must be more than a remote or trivial factor. It
6 does not have to be the only cause of the harm. Conduct is not
7 a substantial factor in causing harm if the same harm would
8 have occurred without that conduct.

9 A person or entity's conduct may combine with another
10 factor to cause harm. If you find that Chart's conduct was a
11 substantial factor in causing plaintiffs' harm, then Chart is
12 responsible for the harm. Chart cannot avoid responsibility
13 just because some other person, condition, or event was also a
14 substantial factor in causing plaintiffs' harm.

15 Chart claims that the negligence of Pacific Fertility
16 Center contributed to plaintiffs' harm. To succeed on this
17 claim, Chart must prove both of the following by a
18 preponderance of the evidence:

19 First, that Pacific Fertility Center and its employees and
20 agents were negligence; and, second, that this negligence was a
21 substantial factor in causing plaintiffs' harm.

22 If you find that the members of Pacific Fertility Center
23 and its employees and agents was a substantial factor in
24 causing plaintiffs' harm, you must then decide how much
25 responsibility Pacific Fertility Center has by assigning

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1 percentages of responsibility to Pacific Fertility Center and
2 to Chart on the verdict form. The percentages must total
3 100 percent.

4 For purposes of these instructions, Pacific Fertility
5 Center's employees include employees of Pacific Fertility
6 Center, Pacific MSO, LLC and/or Prelude Fertility, Inc.

7 You will make separate findings of each plaintiffs' total
8 damages if any. In determining an amount of damages, you
9 should not consider any entity's assigned percentage of
10 responsibility.

11 Negligence is the failure to use reasonable care to
12 prevent harm to oneself or to others. Pacific Fertility Center
13 can be negligent by its employees or agents acting or by
14 failing to act.

15 Pacific Fertility Center was negligent if its employees or
16 agents did something that a reasonably careful person would not
17 do in the same situation or failed to do something that a
18 reasonably careful person would do in the same situation. You
19 must decide how a reasonably careful person would have acted in
20 Pacific Fertility Center employees' situation.

21 Plaintiffs have the burden of proving their claims and
22 Chart has the burden of proving its affirmative defenses by a
23 preponderance of the evidence.

24 When a party has the burden of proving any claim or
25 affirmative defense by a preponderance of the evidence, it

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1 means you must be persuaded by the evidence that the claim or
2 affirmative defense is more probably true than not true.

3 You should base your decision on all of the evidence,
4 regardless of which party presented it.

5 If you decide that plaintiff has proved any of the strict
6 liability claims against Chart, and that Chart has not proved
7 its misuse/modification affirmative defense, or you decide
8 plaintiffs have proved their negligent failure to
9 recall/retrofit claim, you must also decide how much money will
10 reasonably compensate plaintiffs for the harm. This
11 compensation is called "damages."

12 The amount of damages must include an award for each item
13 of harm that was caused by Chart's conduct, even if the
14 particular harm could not have been anticipated.

15 Plaintiffs do not have to prove the exact amount of
16 damages that will provide reasonable compensation for the harm.
17 However, you must not speculate or guess in awarding damages.

18 The damages claimed by each plaintiff for the harmed
19 caused by Chart fall into two categories, called economic
20 damages and non-economic damages. You will be asked on the
21 verdict form to state the two categories of damages separately
22 as to each plaintiff.

23 The following are the specific items of economic damages
24 claimed by plaintiffs:

25 Damage to eggs or embryos. Plaintiffs' eggs and embryos

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1 do not have an established market value, but plaintiffs may
2 establish their value through other available sources,
3 including the expense of obtaining and cryopreserving the eggs
4 and embryos; the time expended to obtain eggs and embryos; the
5 difficulty associated with obtaining the eggs and embryos; the
6 nature and character of the eggs and embryos; and the use for
7 which the eggs and embryos were intended.

8 No fixed standard exists for deciding the amount of these
9 damages; however, you must consider only the economic value of
10 the eggs and embryos, not their sentimental or emotional value.
11 You must use your judgment to decide a reasonable amount based
12 on the evidence and your common sense.

13 The following are the specific items of non-economic
14 damages claimed by each plaintiff:

15 Past and future mental suffering, inconvenience, grief,
16 anxiety, and emotional distress.

17 No fixed standard exists for deciding the amount of these
18 non-economic damages. You must use your judgment to decide a
19 reasonable amount based on the evidence and your common sense.

20 To recover for future pain and suffering, each plaintiff
21 must prove that they are reasonably certain to suffer that
22 harm. For future emotional distress, determine the amount in
23 current dollars paid at the time of judgment that will
24 compensate each plaintiff for future emotional distress.

25 Each plaintiff is not entitled to damages for any physical

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1 or emotional condition that they had before Chart's conduct
2 occurred. However, if a plaintiff had a physical or emotional
3 condition that was made worse by Chart's wrongful conduct, you
4 must award damages that will reasonably and fairly compensate
5 them for the effect on that condition.

6 Now, before you begin your deliberations -- and that will
7 occur tomorrow after closing arguments -- elect one member of
8 the jury as your presiding juror. The presiding juror will
9 preside over the deliberations and serve as the spokesperson
10 for the jury in court.

11 You shall diligently strive to reach agreement with all of
12 the other jurors if you can do so. Your verdict must be
13 unanimous as to each issue submitted to you.

14 And each of you must decide the case for yourself, but you
15 should do so only after you have considered all the evidence,
16 discussed it fully with all the other jurors and listened to
17 their views.

18 It is important that you attempt to reach a unanimous
19 verdict, but of course only if each of you can do so after
20 having made your own conscientious decision. Do not be willing
21 to change your opinion if the discussion persuades you that you
22 should. But do not come to a decision simply because other
23 jurors think it is right, or change an honest belief about the
24 weight and effect of the evidence simply to reach a verdict.

25 Now, I have just a handful more that I will read to you

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1 tomorrow, after you hear the closing arguments.

2 What I'd like you to do now is go back to your jury
3 courtroom and select your presiding juror. And then I would
4 like you to discuss your schedule because you now get to set
5 the schedule as opposed to the Court. And in particular for
6 tomorrow, discuss how long you would like to stay tomorrow.

7 If you're going to stay past 1:30, we will order lunch for
8 you. So we'll have lunch for you. You won't have to bring it.
9 And you should also discuss on Thursday what your schedule
10 would be. And that's just so all of you can plan, make your
11 plans accordingly.

12 So I'd like you to do that, and then you can text
13 Ms. Means. She'll give you the instructions when you have
14 decided on your schedule.

15 Tomorrow we're going to commence right away with the
16 closing arguments. We're going to start a little bit later,
17 just 9:00 a.m. You're welcome to come here, though, and arrive
18 as early as you usually do because I know for traffic reasons
19 some of you may do so. But the closing arguments will start
20 sharply at 9:00 a.m.

21 All right. Thank you very much. Ms. Means will bring you
22 to the jury room so you can discuss the schedule.

23 **JUROR:** Thank you.

24 (Jury out at 10:17 a.m.)

25 **THE COURT:** Okay. So for the exhibits, the jury will

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1 be given a computer and a USB device that you guys need to
2 figure out. So that's what you're going to be doing today, or
3 shortly now, is get that USB.

4 And you can work with Ms. Means when she returns to make
5 sure we have agreement on all the exhibits that were admitted.
6 And then I know there's some things that we wanted to redact
7 from those exhibits. So that's up to you all to make sure that
8 gets redacted and placed on the USB port so that when we are
9 here at 8:30 tomorrow morning -- Mr. Duffy, if you're late
10 that's okay; your colleagues can handle that -- but at 8:30 we
11 have the USB that we will give the jury so they can immediately
12 begin reviewing exhibits if they want to.

13 **MS. ZEMAN:** Your Honor, is the intention that they
14 will get all of the exhibits electronically, or is that just
15 for the subset of materials that were Excel documents?

16 **THE COURT:** No, the policy during these COVID times is
17 for all of it.

18 **MS. ZEMAN:** Got it.

19 **THE COURT:** Yeah, all of it. I think, actually,
20 that's what they're used to in any way.

21 **MS. ZEMAN:** Good.

22 **THE COURT:** Yeah, it will be all of it. They will
23 have a computer there, and they'll have all of it.

24 Okay. Anything we need to discuss about closing
25 arguments?

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1 I guess, how much time will you be reserving, do you
2 think, Ms. Sharp? Or maybe it doesn't matter. I'll leave that
3 up to you. You have two hours total. If you use your whole
4 two hours initially then you'll be out of luck.

5 **MS. SHARP:** Understood. Thank you, Your Honor.

6 **MR. DUFFY:** Thanks, Your Honor.

7 **THE COURT:** Okay. Thank you.

8 **MR. DUFFY:** Thank you.

9 (At 10:19 a.m. the proceedings were adjourned until
10 Wednesday, June 9, 2021, at 9:00 a.m.)

11 - - - - -

12 **CERTIFICATE OF REPORTER**

13 I certify that the foregoing is a correct transcript
14 from the record of proceedings in the above-entitled matter.

15 DATE: Tuesday, June 8, 2021

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19 

20 Katherine Powell Sullivan, CSR #5812, RMR, CRR
21 U.S. Court Reporter
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23
24
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